Supreme Court, U.S.
FILED
OCT 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-477

In The
Supreme Court of the United States
October Term, 1987

—o—

ALBERT J. FERENS & MARGARET L. FERENS,
His Wife,

Petitioners,

v.

DEERE & COMPANY,

Respondent.

—o—

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

—o—

David P. Helwig, Esquire
Counsel of Record
Gary F. Sharlock, Esquire
Sharlock, Repcheck & Mahler
1110 Two Chatham Center
Pittsburgh, PA 15219
(412) 391-6171

Attorneys for Deere & Company
Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Where petitioners filed a personal injury action in Mississippi for the sole purpose of exploiting that state's six year statute of limitations, and then moved for transfer pursuant to 28 U.S.C. § 1404(a) to the only forum having any recognizable interest in application of its laws to the action, did the transferee district court err by applying the transferee forum's statute of limitations to grant summary judgment in respondent's favor?

PARTIES TO THE PROCEEDING

Respondent is satisfied with the petitioners' presentation of the list of parties to the proceeding. Pursuant to Rule 28.1 respondent states that it has no affiliates or parent company, and no subsidiaries other than those which are wholly owned.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW AND JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. SPECIAL AND IMPORTANT REASONS DO NOT EXIST TO JUSTIFY THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI	5
II. THE GRANTING OF SUMMARY JUDGMENT IN RESPONDENT'S FAVOR WAS PROPER	8
A. The Third Circuit's constitutional analysis was correct	8
B. Proper implementation of 28 U.S.C. § 1404(a) requires application of Pennsylvania's statute of limitations	11
C. The constitutional requirements of federalism, as enunciated in *Erie R.R. v. Tompkins*, compel application of Pennsylvania's statute of limitations	12
CONCLUSION	13

TABLE OF AUTHORITIES

Page

CASES

Allstate Insurance Co. v. Hague, 449 U.S. 302 (1981) 9, 11

Christmas v. Russell, 72 U.S. 290 (1866) 13

Cowan v. Ford Motor Co., 694 F.2d 104 (5th Cir. 1982) 5

Erie R.R. v. Tompkins, 304 U.S. 64 (1938) 3, 4, 5, 10, 12, 13

Goad v. Celotex Corp., No. 86-3540, slip op. (4th Cir. October 16, 1987) 6

Guaranty Trust Co. v. York, 326 U.S. 99 (1945) 10, 12

Headrick v. Atchison, T.&S.F. R.R., 182 F.2d 305 (10th Cir. 1950) 11

Home Insurance Co. v. Dick, 281 U.S. 397 (1930) 9

Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984) 10

Klaxon Co. v. Stentor Electric Manufacturing Co., 313 U.S. 487 (1941) 12

Koontz v. International Harvester Co., appeal docketed, No. 87-1371 (3rd Cir. July 2, 1987) 5

McVicar v. Standard Insulations, Inc., 824 F.2d 920 (11th Cir. 1987) 5

Norwood v. Kirkpatrick, 349 U.S. 29 (1955) 12

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) 11

Schreiber v. Allis-Chalmers Corp., 611 F.2d 790 (10th Cir. 1979) 5

Shewbrooks v. A.C.&S., Inc., No. 56,014, slip op. (Miss. August 19, 1987) 7

Wells v. Simonds Abrasive Co., 345 U.S. 514 (1953) 9

TABLE OF AUTHORITIES—Continued

Page

White v. Malone Properties, Inc., No. 55,195, slip op. (Miss. March 12, 1986) *withdrawn* 494 So. 2d 576 (Miss. 1986) 6

Van Dusen v. Barrack, 376 U.S. 612 (1964) 4, 5, 11

STATUTES

28 U.S.C. § 1404(a) 2, 3, 4, 6, 11, 13

Miss. Code Ann. § 15-1-49 (1972) 2

Miss. Code Ann. § 15-1-65 (1972) 1

42 Pa. Cons. Stat. Ann. § 5524(2) (Purdon 1981) 2

RULES OF COURT

Fed. R. Civ. P. 54(b) 3, 8

OTHER AUTHORITIES

RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 142 (1986 REVISIONS) 12

ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (1969) 12

OPINIONS BELOW AND JURISDICTION

Respondent is satisfied with the petitioners' presentation of the opinions below and grounds on which the jurisdiction of this Court is invoked.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to those provisions set forth in the petition, this case involves Miss. Code Ann. § 15-1-65 (1972) which provides:

> When a cause of action has accrued in some other state or in a foreign country, and by the law of such state or country, or some other state or country where the defendant has resided before he resided in this state, an action thereon cannot be maintained by reason of lapse of time, then no action thereon shall be maintained in this state.

STATEMENT OF THE CASE

On July 5, 1982, Albert J. Ferens was injured while cleaning a combine manufactured by Deere & Company. The accident occurred on petitioners' farm in Pennsylvania. Mr. and Mrs. Ferens are Pennsylvania residents. Mr. Ferens purchased the combine in Pennsylvania. On July 3, 1985, petitioners filed an action in the United States District Court for the Western District of Pennsylvania seeking damages for Mr. Ferens' injuries based on various breach of warranty theories.

On July 25, 1985, petitioners filed an action in the United States District Court for the Southern District of Mississippi seeking damages for the injuries sustained in the July 5, 1982 accident based on theories of negligence and strict liability. The Mississippi statute of limitations for such actions is six years. Miss. Code Ann. § 15-1-49 (1972). Pennsylvania's two year statute of limitations would have barred the petitioners' negligence and strict liability action had the action been filed there. 42 Pa. Cons. Stat. Ann. § 5524(2) (Purdon 1981). Respondent filed an Answer to the Mississippi action which denied liability and raised the defense of statute of limitations. Prior to initiating any discovery or otherwise attempting to prosecute the action in Mississippi, petitioners filed a motion to transfer that action to the United States District Court for the Western District of Pennsylvania pursuant to 28 U.S.C. § 1404(a). The motion was supported by an affidavit signed by Mr. Ferens which stated, *inter alia*, that:

(1) The combine was purchased in Pennsylvania and continued to be located in Pennsylvania;

(2) The accident occurred in Pennsylvania;

(3) "All witnesses with any knowledge of the accident or injuries husband-plaintiff sustained, including doctors, hospital personnel and who plaintiffs will call and use, reside in the Western District of Pennsylvania"; and

(4) "All documents relating to the personal injuries plaintiff sustained are located in the Western District of Pennsylvania."

Petitioners' motion was granted on November 8, 1985.

Following transfer the Mississippi action and the Pennsylvania action were consolidated on petitioners' motion. Thereafter, respondent moved for summary judgment in both actions. The motion for summary judgment in the negligence and products liability (Mississippi) action was based on respondent's contention that, under the particular facts of the case, proper implementation of 28 U.S.C. § 1404(a), as well as the constitutional principles enunciated in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), required application of Pennsylvania's statute of limitations. The district court granted that motion for summary judgment, holding that to apply Mississippi's statute of limitation would be to countenance a "judicial juggling act between forums—one with a clear interest in the litigation and one whose interest is nominal at best." 639 F. Supp. at 1492. The district court denied, without prejudice, respondent's motion for summary judgment as to the breach of warranty (Pennsylvania) action.

In order to obtain immediate review of the district court's ruling on the statute of limitations issue, petitioners filed a "motion for certification and final judgment upon less than all claims pursuant to rule 54(b) and request for stay of further proceedings . . .". The district court granted that motion. On appeal a panel of the United States Court of Appeals for the Third Circuit affirmed the district court in a 2-1 decision. The majority's opinion held that granting of summary judgment was proper because application of Mississippi's statute of limitations to a cause of action having no connection with Mississippi, apart from the fortuitous circumstance that respondent did business there, violated the due process and full faith and credit clauses of the United States Constitution. The court

concluded that "Mississippi's contacts with the parties and the occurrence or transaction are plainly so insignificant that the application of its law would be arbitrary, fundamentally unfair, and therefore unconstitutional." The panel's opinion did not dispose of respondent's contentions that the granting of summary judgment was also correct based on the proper implementation of 28 U.S.C. § 1404(a) and based on the constitutional constraints of federalism recognized in *Erie R.R. v. Tompkins*, and its progeny. Petitioners' petition for rehearing and rehearing en banc was denied on July 9, 1987.

SUMMARY OF ARGUMENT

Special and important reasons do not exist to justify the granting of the Petition for a Writ of Certiorari. There are significant factual differences between the present case and the two with which it nominally conflicts. Those differences give rise to two strong alternative grounds for affirming the summary judgment in respondent's favor. The conflict may be eliminated by the Third Circuit, which has been asked to reconsider the question raised by petitioners in another appeal now pending before it. The interest which petitioner seeks to have vindicated is not of a magnitude which merits exercise of this Court's discretionary review.

The Third Circuit correctly concluded that application of Mississippi's statute of limitations would violate the due process and full faith and credit clauses of the Constitution where the action's only contact with Mississippi was the fact that respondent did business there. Proper implementation of 28 U.S.C. § 1404(a), in light of that statute's purpose and the Court's analysis in *Van*

Dusen v. Barrack, 376 U.S. 612 (1964), requires application of Pennsylvania's statute of limitations. The constitutional principles of federalism which were enunciated in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) compel the application of Pennsylvania's statute of limitations under the particular facts of this case.

ARGUMENT

I. SPECIAL AND IMPORTANT REASONS DO NOT EXIST TO JUSTIFY THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI.

The petition correctly states that the Third and Fifth Circuits have reached different conclusions on the question of whether a forum's statute of limitation constitutionally may be applied to a cause of action whose only contact with the forum is the fact that the defendant is subject to personal jurisdiction there. Subsequent to filing of the petition, the Fourth Circuit has reached a conclusion in accord with that of the Fifth Circuit, albeit not in a case involving Mississippi's statute of limitations. *Goad v. Celotex Corp.*, No. 86-3540, slip op. (4th Cir. October 16, 1987). (The cases of *Schreiber v. Allis-Chalmers Corp.*, 611 F.2d 790 (10th Cir. 1979) and *McVicar v. Standard Insulations, Inc.*, 824 F.2d 920 (11th Cir. 1987), cited in the petition, did not address the constitutional question which petitioners seek to have reviewed.) Respondent believes, however, that in the context of the facts of this case the question presented is not sufficiently ripe to justify review at this time. Neither *Cowan*, nor *Goad* involved the question of whether the initial forum's statute of limitations should be applied following a plaintiff-initiated § 1404(a) transfer. As demonstrated in the second

section of respondent's argument, there are two sound reasons why the granting of summary judgment in respondent's favor should be sustained, even apart from the constitutional analysis applied by the Third Circuit. Furthermore, the Third Circuit has been asked to reconsider its analysis in a case which is now pending before it, *Kooniz v. International Harvester Co. appeal docketed*, No. 87-1371 (3rd Cir. July 2, 1987).

Respondent also questions whether, as a matter of sound judicial policy, the interest asserted by petitioners—the alleged right to capture the favorable statute of limitations of a remote forum so as to avoid the barring of a stale claim, while contemporaneously manipulating 28 U.S.C. § 1404(a) so as to have the action tried in the forum where it arose and where it would be time-barred—constitutes the sort of interest which the Court should vindicate by exercise of its discretionary powers of review. Recent opinions by the Mississippi Supreme Court indicate that it will soon put an end to that jurisdiction's status as a dumping ground for stale tort claims. Thus, in *White v. Malone Properties, Inc.*, No. 55,195, slip op. (Miss. March 12, 1986), the Mississippi Supreme Court held that it would adopt the "center of gravity" conflicts of law approach to determine the applicable statute of limitations for actions arising outside of Mississippi. The Mississippi Supreme Court later withdrew its original slip opinion and substituted an opinion which sustained the result originally reached by it in that case, but on other grounds. *White v. Malone Properties, Inc.*, 494 So.2d 576 (Miss. 1986). The reported opinion does not indicate why the original opinion was withdrawn. A concurring opinion adopted by two members of that court indicated that they would adhere to the view that the center of gravity

analysis should apply to determine the applicable statute of limitations.

A subsequent case, *Shewbrooks v. A.C.&S., Inc.*, No. 56,014 slip op. (Miss. August 19, 1987) indicates that the Mississippi Supreme Court remained troubled by its "generous statutes of limitations [that] make its courts highly attractive to dilatory plaintiffs and forum-shoppers." *Id.* slip op. at 4. In *Shewbrooks* the court dismissed the action on forum non conveniens grounds because the action involved foreign plaintiffs and defendants and a foreign cause of action. The court also noted that "Justice Robertson's concurring opinion in *White v. Malone Properties, Inc.*, 494 So.2d at 582-83, contains an eloquent discussion of these problems. It may be that in the future, our trial judges will make more frequent use of their sound discretion to dismiss actions unrelated to Mississippi for forum non conveniens. If so, this Court will not lightly second-guess them. We are not eager to see Mississippi become a dumping ground for the nation's homeless litigation." *Id.* slip op. at 4-5. Respondent respectfully suggests that Mississippi already is such a dumping ground, but that its supreme court is on the way to ending that status. The likelihood of such action by the Mississippi Supreme Court minimizes whatever justification may presently exist for viewing this matter as involving special and important concerns.

Finally, respondent would note that petitioners are not completely foreclosed from recovery for Mr. Ferens' injuries by the Third Circuit's decision. Petitioners' action to recover based on breach of warranty is still pending in the district court. Petitioners may recover by way

of verdict or settlement in that action, in which case granting review would turn out to have been a needless exercise. Although petitioners were within their rights in moving to seek immediate review by filing of their rule 54(b) motion, the pendency of the breach of warranty action certainly may be considered in deciding whether or not it is provident to grant the petition for writ of certiorari.

II. THE GRANTING OF SUMMARY JUDGMENT IN RESPONDENT'S FAVOR WAS PROPER.

A. The Third Circuit's constitutional analysis was correct.

The Third Circuit concluded that "Mississippi's contacts with the parties and the occurrence or transaction are plainly so insignificant that the application of its law would be arbitrary, fundamentally unfair, and therefore unconstitutional. . . . Consequently, because Mississippi could not apply its own law to the Ferenses' suit against Deere if the suit were pending in a Mississippi state court, neither *Klaxon* nor *Barrack* require that a federal diversity forum do so either." 819 F.2d at 427. Respondent sees no point in merely parroting the cogent analysis which led the Third Circuit to its conclusion. Rather, respondent will address petitioners' contentions that the Third Circuit's analysis is contrary to this Court's decisions.

The petition appears to suggest that because statutes of limitations were historically regarded as procedural, rather than substantive, in nature those statutes are not subject to any constitutional constraints. That suggestion is not supported by the cases cited in the petition. The cases cited therein simply acknowledge the historical con-

flict of laws principle, whose continued vitality has been questioned increasingly during the past two decades, that limitation of actions is routinely governed by the lex fori. As stated in *Wells v. Simonds Abrasive Co.*, 345 U.S. 514 (1953), states' adoption of conflict of laws rules is "subject to the full faith and credit clause and other constitutional restrictions." 345 U.S. at 516. Prominent among those other constitutional restrictions is the fourteenth amendment. Both *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930) and *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981) recognize that the fourteenth amendment restricts the ability of states to apply their own statutes of limitation to causes of action whose contacts with the forum state are either highly attenuated or non-existent.

With one exception, the cases cited at pages eleven and twelve of the petition all sustained application of a statute of limitations or a contractual provision to bar collection of a judgment or prosecution of a cause of action. To the extent that certain statements in those cases, when taken out of context, may appear to support petitioners' claim that application of Mississippi's statute of limitations is sacrosanct, respondent believes that those cases are inapposite. Indeed, the cases may actually be read to support respondent. That is because respondent denies that Mississippi is entitled to be treated as a "forum" under the particular circumstances of this action. Under any realistic view of the case, Pennsylvania is the only true forum. The case's transient presence in Mississippi should be regarded as a nullity.

The wooden approach followed by petitioners, whereby complex conflicts of law issues are resolved by treating the

terms "substantive" and "procedural" as shibboleths, was discarded by this Court many years ago. Thus, in clarifying the constitutional dimensions of federalism which were announced in *Erie R.R. v. Tompkins, supra*, the Court has explained:

> It is therefore immaterial whether statutes of limitation are characterized either as "substantive" or "procedural" in State court opinions in any use of those terms unrelated to the specific issue before us. *Erie R. Co. v. Tompkins* was not an endeavor to formulate scientific legal terminology. It expressed a policy that touches vitality the proper distribution of judicial power between State and federal courts. In essence, the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal courts should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court. *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945)

The fact that Mississippi state courts historically have regarded that state's statute of limitations as procedural cannot foreclose inquiry into the constitutionality of applying its statute of limitations under the facts of a given case.

Similarly, petitioners' argument that existence of contacts sufficient to satisfy due process constraints on exercise of personal jurisdiction, necessarily surmounts due process barriers to application of a forum's statute of limitations is plainly wrong. These two aspects of due process were expressly distinguished in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 778 n. 10 (1984). (Noting

"considerable academic criticism of the rule that permits a forum State to apply its own statute of limitations regardless of the significance of contacts between the forum State and the litigation.") "The Court has recognized that examination of a State's contacts may result in divergent conclusions for jurisdiction and choice-of-law purposes." *Allstate Insurance Co. v. Hague, supra,* 449 U.S. at 317 n. 23. The holding of *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797 (1985) is to the same effect.

B. Proper implementation of 28 U.S.C. § 1404 (a) requires application of Pennsylvania's statute of limitations.

In *Van Dusen v. Barrack*, 376 U.S. 612 (1964), the Court expressly reserved judgment on the question of whether the transferor forum's choice of law would apply following transfer on plaintiff's motion pursuant to 28 U.S.C. § 1404(a). (*Van Dusen's* citation of *Headrick v. Atchison, T.&S. F. R.R.*, 182 F.2d 305 (10th Cir. 1950) does not avail petitioners in light of that reservation. *Headrick* involved a motion for transfer by defendant and did not address any of the constitutional issues raised in the present action.) A principal concern of the Court in *Van Dusen v. Barrack* was to avoid transformation of § 1404(a) into a forum-shopping vehicle utilized by the moving party to capture favorable law. 376 U.S. at 636. Petitioners can hardly deny that their sole purpose in filing this action in Mississippi was to exploit Mississippi's six year statute of limitation, with the expectation that the case would be transferred to the most convenient forum. 28 U.S.C. § 1404 (a) was never intended to serve such a purpose. Rather, § 1404(a) was designed to mitigate the harsh consequences

which flowed from dismissals under the doctrine of forum non conveniens. *Norwood v. Kirkpatrick,* 349 U.S. 29 (1955). Various commentators, as well as the American Law Institute, have taken the view that application of the transferee forum's choice of law is desirable following transfer pursuant to plaintiff's § 1404(a) motion. ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (1969). *Cf.* RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 142 (1986 Revisions). (Action barred by the forum's statute of limitations or by that of another state which "has a more significant relationship to the parties and the occurrence", whichever is shorter.)

C. The constitutional requirements of federalism, as enunciated in Erie R.R. v. Tompkins, compel application of Pennsylvania's statute of limitations.

Erie R.R. v. Tompkins, supra, held that limitations inherent in the Constitution required federal courts to apply the decisional law of the forum state within which the federal court was situated, when deciding cases in which jurisdiction was based on the parties' diversity of citizenship. Subsequent cases have interpreted *Erie,* and the constitutional analysis on which it was grounded, to require application of the forum state's statute of limitations, *Guaranty Trust Co. v. York, supra,* and conflict of laws rules, *Klaxon Co. v. Stentor Electric Manufacturing Co.,* 313 U.S. 487 (1941). Respondent submits that the constitutional principle recognized by those cases compels the application of Pennsylvania's statute of limitations in the present action. Had this action been filed in Pennsylvania, it would have been barred by Pennsylvania's statute of limitations. If

respondent's position is accepted, then the twin "accidents" of diversity jurisdiction and the existence of 28 U.S.C. § 1404(a) will require the United States District Court for the Western District of Pennsylvania to determine the outcome of this case (so far as the statute of limitations is concerned) in a manner completely contrary to the result that would have been reached by Pennsylvania state courts. The practical effect of this Court's accepting petitioner's contentions regarding § 1404(a) would be to adopt a six year federal statute of limitations for all tort claims in which diversity jurisdiction exists and defendant has minimum contacts with Mississippi. Such a result violates not only the teaching of *Erie v. Tompkins*, but also the full faith and credit clause as interpreted in *Christmas v. Russell*, 72 U.S. 290 (1866).

CONCLUSION

For the foregoing reasons, respondent requests that the Petition for a Writ of Certiorari to the United States Court of Appeal for the Third Circuit be denied.

Respectfully submitted,

David P. Helwig, Esquire
Counsel of Record
Gary F. Sharlock, Esquire
Sharlock, Repcheck & Mahler
1110 Two Chatham Center
Pittsburgh, PA 15219
(412) 391-6171

Attorneys for Deere & Company, Respondent